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No. 04-1704 & 04-1724

In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,
Petitioners,

v.

CHARLOTTE CUNO, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* MICHIGAN ECONOMIC DEVELOPMENT CORPORATION IN SUPPORT OF PETITIONERS DAIMLERCHRYSLER CORPORATION, AND STATE OF OHIO

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Michigan Economic Development Corporation ("MEDC") is a public body corporate created under section 28 of Article VII of the State of Michigan Constitution of 1963, and the Urban Cooperation Act of 1967, 1967 PA 7, MCL 124.501 to 124.512, by contractual interlocal agreement effective April 5, 1999 between local participating economic development corporations formed under the Economic Development Corporations Act, 1974 PA 338, MCL 125.1601 to 125.1636, and the Michigan Strategic Fund, a state agency.

The MEDC's interest in this case arises from the fact that it administers most of the economic development programs of the State of Michigan, including certain programs involving tax credits, and is the principal governmental agency in Michigan for promoting economic development. Because the State of Michigan resides within the Sixth Circuit, the court of appeals' decision in this matter would serve as binding precedent in federal courts in Michigan, and therefore may affect Michigan laws involving economic development matters.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* state that no counsel for a party has written this brief in whole or in part, and no person or entity, other than amicus, its members, or their counsel, has a made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

The MEDC urges the Court to grant Petitioners' DaimlerChrysler Corporation and State of Ohio (the "Petitioners") Petitions for a Writ of Certiorari and asserts that the decision of the Sixth Circuit in this matter requires immediate review for the following reasons:

1. It is not supported by the case law which it cites as its supporting precedent; to the contrary, this decision is in fact unprecedented and is counter to prior well established precedents.

2. The decision is internally inconsistent and contradictory because it upholds a property exemption on the basis that it is "related to the use or location of the property itself," yet invalidates the Ohio investment tax credit, which also meets this criteria.

3. The decision is inconsistent with prior U.S. Supreme Court and other higher court opinions, upholding Michigan tax laws that include similar, though not identical, tax credits or deductions as being valid under the U.S. Commerce Clause.

INTRODUCTION

The Michigan Economic Development Corporation ("MEDC") supports the Petitioners' Petitions for a Writ of Certiorari. The MEDC files this Amicus Curiae brief because of its apprehension that the Sixth Circuit has embarked on a radical departure from well settled precedents interpreting the "Dormant" Commerce Clause doctrine as it applies to state tax law. As previously acknowledged by the Plaintiffs, they propose a "novel legal theory." The MEDC strongly believes

that the Sixth Circuit's acceptance (at least in part) of this "novel legal theory" contradicts many well established precedents, and must be reviewed and reversed, immediately.

ARGUMENT

This matter arises from the Sixth Circuit's decision filed on September 2, 2004, and amended on October 19, 2004 where it invalidated an Ohio investment tax credit ("Ohio ITC") as violative of the Dormant Commerce Clause. The Ohio ITC grants a credit against that state's corporate franchise tax for "purchases of new machinery and equipment... provided..[it is] installed in [Ohio]." Ohio Rev. Code §5733.33(B)(1).

The Sixth Circuit in this case concluded that the Ohio ITC discriminates against interstate commerce by "coercing" businesses already subject to its state franchise tax to expand locally rather than out of state. *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 746 (6th Cir. 2004). Furthermore, the Sixth Circuit stated:

> Moreover, as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax.

Id. at 743. The Sixth Circuit then concluded that the Ohio ITC violated the third prong of the *Complete Auto Transit*[2] test (i.e., that a tax must not discriminate against interstate commerce). This conclusion is flawed and warrants immediate review for several reasons.

I. The Cases Cited By The Sixth Circuit Do Not Support Its Conclusion.

This case involves a tax incentive promoting purely in-state activity. The reasoning in the three cases cited by the Sixth Circuit are contrary to its conclusion. In *Boston Stock Exchange v. State Tax Commissioner*, 429 U.S. 318 (1997), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Westinghouse Electric Corporation v. Tully*, 466 U.S. 388 (1984), this Court addressed legal and factual issues differing significantly from this case. Each of these decisions addressed situations where states essentially imposed a higher tax on some out-of-state good or service which had the effect of giving preferential treatment to in-state businesses; none of these situations, however, involved a tax credit aimed at creating an incentive for in-state capital investment. In all three of the cited decisions (*Boston Stock Exchange, Westinghouse, and Maryland)* this Court struck down tax laws that encouraged the development of local industry by imposing higher transactional taxes on economic activities occurring outside of the state than were imposed on similar in-state activities. The net effect was a tax on the sale of products or services in another state that was higher than on

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[2] *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 97 S.Ct. 1076, 51 L.Ed. 2d 326 (1977)

comparable in-state sales. This is clearly discriminatory.[3] The crucial distinction between the cases cited in the Sixth Circuit's decision and this case is that the Ohio ITC does not tax any out-of-state sales. The Ohio ITC is a one-time "optional" tax incentive that promotes only in-state/intrastate investment. Sales of products or services are not taxed in any way. The Ohio ITC does not give a competitive advantage to in-state taxpayers like the statutes invalidated in *Boston Stock Exchange, Maryland* and *Westinghouse*. In fact, the tax credit appears to be equally available to both in-state and out-of-state businesses.

The Ohio ITC does not constitute the type of discriminatory tax scheme typically held to violate the Dormant Commerce Clause doctrine. The typical application of this doctrine in the context of state tax law is to invalidate discriminatory tax schemes that unduly burden interstate commerce and give a competitive advantage to in-state taxpayers, and disadvantage out of state taxpayers. However, the Ohio ITC does not do this.

The Ohio ITC applies solely to in-state activity. This is exactly the type of tax incentive that has been consistently ruled valid by courts interpreting the dormant commerce clause doctrine. The decision of the lower court must be reconsidered for these reasons.

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[3] The Petition for a Writ of Certiorari of DaimlerChrysler Corporation, at pp. 19 – 21, succinctly spells out the distinction; therefore, we rely upon that argument, and will not reiterate it here.

II. The Sixth Circuit's Reasoning Is Internally Inconsistent And Contradictory

The Sixth Circuit upheld the validity of the personal property tax exemption that was challenged in this case. What is curious about this aspect of the opinion is that the rationale used to uphold the property tax exemption actually supports upholding the validity of the Ohio ITC, as well:

> Although conditions imposed on property tax exemptions may independently violate the commerce clause, conditional exemptions raise no constitutional issues, when the conditions for obtaining the favorable tax treatment are related to the use or location of the property itself. Stated differently, an exemption may be discriminatory if it requires a beneficiary to engage in another form of business in order to receive the benefit or is limited to businesses with a specified economic presence. *Cf. Maryland, 451 US at 756-57* However, if the conditions imposed on the exemption do not discriminate based on an independent form of commerce, they are permissible." (emphasis added). *Cuno,* 386 F.3d at 746-47.[4]

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[4] The Sixth Circuit, while citing no direct judicial authority in support for its determination of the validity of Ohio's personal property tax exemption, looked to *Maryland v Louisiana, infra,* as showing an example of state action that was unconstitutional. As the Court is undoubtedly aware, there is a substantial academic debate ongoing as to the validity of tax incentives on Dormant Commerce Clause grounds. One such article is authored by Professors Hellerstein and Coenen, entitled "Commerce Clause Restraints On State Business Development Incentives," 81 Cornell L. Rev. 789 (1996). This portion of the Sixth Circuit's decision is significant because it appears to adopt the one exception to what

In this case, the Ohio ITC invalidated by the Sixth Circuit is obviously a tax that is "related to the use or location" of the property itself. Though limited to businesses with a specified economic presence within the state, it does not discriminate against "out-of-state" businesses. Thus, the logic the court of appeals used to uphold the property tax exemption appears to support upholding the validity of the Ohio ITC, as well.

Furthermore, the Sixth Circuit admits that a similar subsidy for economic development purposes would pass constitutional muster. The purpose of the Dormant Commerce Clause doctrine is not to exalt form over substance. Rather, its purpose is to strike down substantial and unjustified burdens on interstate commerce, and tax laws that either facially or in actuality give preferred treatment to specified local interest. The Ohio ITC does neither.

III. Unless Overturned, The Sixth Circuit's Decision is Potentially Disruptive to Economic Development Activity in the State of Michigan.

Two prior court opinions, one by this Court in 1991, the other by the Michigan Supreme Court in 1992 (for which certiorari was denied), addressed the validity of Michigan's taxing scheme and a similar investment tax credit statute in the face of a challenge on commerce clause grounds. If not

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Professors Hellerstein and Coenen termed as their "in-state favoritism/state-coercion" approach: the Commerce Clause is not offended where a state invites a taxpayer or potential taxpayer to invest so long as the tax burden is not increased for that taxpayer should the invitation be declined. *Id.* at p.806 - 7.

reviewed, the holding in this case may call into question the continuing validity of those decisions.

In *Trinova Corporation v. the Department of Treasury*, 498 U.S. 358 (1991), this Court addressed a challenge to Michigan's Single Business Tax ("SBT"). The plaintiff in that case alleged that the Michigan SBT discriminated against out-of-state businesses in violation of the commerce clause. This Court flatly rejected this assertion. Subsequently, the Michigan Supreme Court rejected a challenge on commerce clause grounds to the validity of the capital acquisition deduction ("CAD") of the SBT, which is available only for capital investments related to Michigan business activities. See *Caterpillar, Inc. v. Department of Treasury*, 440 Mich 400, 488 NW2d. 182 (1992); *cert. den.* 506 U.S. 1014 (1992). Therefore, since 1992 this tax preference for capital investment in Michigan stood as established law, with the apparent blessing of this Court, and has been relied upon by thousands of businesses.

While there are many features of the Michigan SBT CAD and other Michigan tax incentives that are distinguishable from the Ohio ITC invalidated in this case, the Sixth Circuit's decision raises great concern that it intends to embark on an unprecedented change in commerce clause jurisprudence. It appears that the Sixth Circuit is making a significant departure from prior established commerce clause principles by adopting what the Plaintiffs themselves, as well as contemporary academic literature, acknowledge is novel legal theory not directly supported by existing precedents. To provide a measure of certainty, MEDC respectfully urges this Court to review the Sixth Circuit's decision in this matter.

However, perhaps the most unsettling aspect of the court of appeals' decision is the chilling effect it is likely to have on economic development in Michigan.

Uncertainty is perhaps the biggest obstacle to the success of any economic development initiative. If the holding of the decision below is not reversed or modified significantly, it will create uncertainty as to the validity of various Michigan economic development incentives. This will undoubtedly have a negative impact on Michigan's ability to compete with other states, and on an international level. The potential impact on the programs the MEDC administers is extraordinary. Over the past nine years, the State of Michigan has awarded incentive tax credits to 220 business expansion and retention projects which are expected to generate over $11 billion in capital investment and result in the direct creation of 56,100 jobs through the year 2025. Using REMI Policy Insight, a nationally recognized econometric forecasting and policy analysis model, the State of Michigan has projected the creation of 62,301 additional indirect jobs. Total personal income generated as a result of the new jobs will be $82.7 billion, and state revenues are projected to increase $5.4 billion, net of the cost of the credits. Based on actual experience to date with the 65 projects on which credits have been collected, 13,443 direct jobs have been created paying average annual wages of $37,149.

CONCLUSION

For the foregoing reasons, the MEDC respectfully requests that this Court grant the Petitions for a Writ of Certiorari filed by DaimlerChrysler Corporation and the State of Ohio.

Respectfully submitted.

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